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June 12, 1992

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Review of The Commission's Regulations and Policies Affecting Investment In The Broadcast Industry
(MM Docket No. 92-51)

Dear Ms. Searcy:

Submitted herewith for filing, on behalf of our client, Greyhound Financial Corporation, are an original and sixteen (16) copies of its Comments in the above-referenced proceeding.

Please direct any inquiries concerning this submission to the undersigned.

Respectfully submitted,

KAYE, SCHOLER, FIERMAN, HAYS
and HANDLER

By: Irving Gastfreund
Irving Gastfreund

Enclosures

DOC #12069319

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Review of The Commission's	)	MM Docket No. 92-51
Regulations and Policies	)	
Affecting Investment	)	
In the Broadcast Industry	)	

To: The Commission

COMMENTS OF GREYHOUND FINANCIAL CORPORATION

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Counsel to Greyhound Financial Corporation

June 12, 1992

SUMMARY

Greyhound respectfully urges the Commission to clearly declare that:

(a). neither the Communications Act nor Commission policy prohibits a creditor from taking or perfecting a limited security interest in a debtor-licensee's interest in its broadcast license, where such security interest is limited strictly to the extent of the licensee's proprietary rights in the license vis-a-vis private third parties; and

(b). senior secured lenders may, as a consequence, take and perfect a security interest in the proceeds received or to be received by the debtor-licensee from a private buyer in exchange for the sale from the licensee to that buyer of the licensee's broadcast station as a going concern.

Thus, Greyhound respectfully requests that the Commission expressly declare that the right to receive such proceeds is a private right of the licensee that constitutes a proprietary interest in which a creditor may perfect a security interest. Greyhound submits that, absent a clear articulation of such policies by the Commission in this proceeding, capital will become increasingly unavailable for broadcast transactions, with serious adverse consequences flowing to the broadcast industry.

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COMMENTS OF GREYHOUND FINANCIAL CORPORATION

GREYHOUND FINANCIAL CORPORATION ("Greyhound"), by its attorneys, pursuant to Section 1.415 of the Commission's Rules, hereby submits its instant Comments in response to the Commission's Notice of Proposed Rule Making and Notice of Inquiry in MM Docket No. 92-51, ___ FCC Rcd ___, FCC 92-96 (released April 1, 1992) (hereinafter "NPRM").

I. Interest of Greyhound

In its NPRM in this proceeding, the Commission is seeking comment on possible changes in its rules and policies as a means for reducing unnecessary regulatory constraints on investment in the broadcast industry so as to increase the availability of capital for broadcast transactions. The Commission specifically solicited public comment on proposals to modify Commission policies and rules so as to allow creditors to take either a limited security interest or a reversionary interest in a broadcast license issued by the Commission. NPRM, supra, at ¶¶18-23.

Greyhound is a diversified financial services company that provides secured financing of selected commercial activities and is a major lender to companies in the communications industry, including entities licensed by the Commission. Accordingly, Greyhound has a direct and immediate interest in the Commission's resolution of this proceeding, and Greyhound's instant Comments will materially assist the Commission in its resolution of this proceeding.

For the reasons set forth below, Greyhound submits that there is a critical need for the Commission to declare that:

(a). neither the Communications Act nor Commission policy prohibits a creditor from taking or perfecting a limited security interest in a debtor-licensee's interest in its broadcast license, where such security interest is limited strictly to the extent of the licensee's proprietary rights in the license vis-a-vis private third parties; and

(b). senior secured lenders may, as a consequence, take and perfect a security interest in the proceeds received or to be received by the debtor-licensee from a private buyer in exchange for the sale from the licensee to that buyer of the licensee's broadcast station as a going concern.

Thus, Greyhound respectfully requests that the Commission expressly declare that the right to receive such proceeds is a private right of the licensee that constitutes a proprietary interest in which a creditor may perfect a security interest. Greyhound submits that, absent a clear articulation of such policies by the Commission in this proceeding, capital will

become increasingly unavailable for broadcast transactions, with serious adverse consequences flowing to the broadcast industry.

II. The Current Lending Environment

From a simple business perspective, it is self-evident that lenders must provide financing on a secured basis. Senior secured lenders make loans that are intended to be repaid prior to the repayment of other indebtedness of the borrower and which are to be secured by a first-priority lien on all of the assets of the borrower. By making loans on this basis, lenders are capable of limiting their risk to reasonably acceptable levels and, accordingly, to lend funds on a basis that is significantly less expensive to the borrower than would be the case with unsecured or partially secured loans, subordinated debt or other forms of capital.

Most broadcasters require financing for a variety of purposes, including facilities, equipment and services investments, as well as for working capital needs. Most broadcasters have obtained some sort of senior financing secured by the assets of their stations. Some or all of the additional capital required by the licensee is supplied in the form of equity, with the balance oftentimes obtained from so-called "mezzanine" financing sources, which are typically subordinate to the senior secured loans but senior to other debt. It is clearly the expectation of all of the parties to a financing transaction

that the senior secured lender will be entitled to repayment of its loans prior to the repayment of other obligations of the licensee to other creditors, and that such repayment will, if necessary, be made out of the proceeds derived from the sale of the station as a going concern prior to any other application of station sale proceeds. Indeed, vendors, program suppliers, and other general unsecured creditors of a broadcast licensee are ordinarily fully aware that their rights to payment by the licensee will become subordinate to the rights of the senior secured lender in the event that the licensee were to face bankruptcy.

From an economic perspective, prudent lending criteria require that the value of the assets that serve as collateral for a senior secured loan be sufficient to repay the loan in the event that the cash flow from the borrower's operations is insufficient to do so. In attempting to evaluate the debtor's collateral in the context of a broadcast station loan, senior secured lenders have generally looked at the value of the station as a going concern, including the sale of substantially all of the station's assets and the assignment of the station's FCC licenses, pursuant to Commission consent. If the proceeds of the sale of a station as a going concern could not be relied upon as collateral for senior secured lenders, and if such lenders' security interests were limited solely to the liquidation value of the tangible physical assets of the stations involved, prudent

lenders would be unable or unwilling to loan amounts sufficient to enable borrowers to finance broadcast acquisitions, since the liquidation of the station's hard assets generally constitutes only a fraction of the market value of a broadcast station as a going concern.

Until recently, senior secured broadcast lenders have operated under the reasonable expectation that, subject to compliance with statutory requirements under the Uniform Commercial Code, and subject to obtaining all required Commission consents to assignment of licenses or transfer of control over a broadcast licensee, they would be able to obtain repayment of their loans, if necessary, from the proceeds of sale, as going concerns, of broadcast stations whose assets secured their loans. However, as noted by the Commission in its NPRM in this proceeding, certain recent court decisions arising out of bankruptcy proceedings have called this expectation into question by holding, on the basis of certain statements made by the Commission in dicta, that a security interest cannot be taken in a broadcast license and that, therefore, the senior secured lender was not secured to the extent of the full value of a broadcast station as a going concern. These decisions, discussed more fully below, call for prompt Commission declaration of policy in this area that will have the salutary effect of enunciating clearly for bankruptcy and other courts that senior secured lenders may take and perfect a limited security interest

in the value of a broadcast station as a going concern and in the proceeds of the sale of such a station, thereby fostering a return to a more certain and secure lending environment. Clarification of the Commission's position in the manner requested by Greyhound will thus encourage lenders to continue to finance broadcast acquisitions by easing their legitimate concerns as to whether they can rely upon the proceeds of the going-concern value of a station to secure such broadcast transactions.

III. Past Commission Pronouncements Concerning Security Interests and Broadcast Licenses

The Commission has, in the past, suggested that a lender/creditor may not take or perfect a security interest in a broadcast license. Radio KDAN, Inc., 11 FCC 2d 934, 934 n. 1 (1968), reconsideration denied, 13 RR 2d 100 (1968), aff'd on other grounds sub nom., Hansen v. FCC, 413 F.2d 374 (D.C. Cir. 1969). In its reconsideration opinion in Radio KDAN, Inc., the Commission noted, in dicta, that:

> "[t]he Commission has consistently held that a broadcast license (as distinguished from a station's plant or physical assets) may not be hypothecated by way of mortgage, lien, pledge, lease, etc."
>
> 13 RR 2d at 102.

The Commission cited no other precedent other than to assert that the "principle" derived "ultimately" from Section 301 of the Communications Act.

The implicit suggestion by the Commission in Radio KDAN, Inc., that the granting of a security interest in a broadcast license is statutorily prohibited by the Communications Act was further developed by the Commission in several subsequent decisions. In Kirk Merkley, 94 FCC 2d 829 (1983), the Commission cited Sections 301, 304, 309(h) and 310(d) of the Communications Act[1] for the proposition that a broadcast license "is not an owned asset or vested property interest so as to be subject to a mortgage, lien, pledge, attachment, seizure or similar property right." 94 FCC 2d at 830. The Commission's stated rationale for this policy was that "such hypothecation endangers the individuality of the licensee who is and who should be at all times responsible for and accountable to the Commission in the exercise of the broadcasting trust." Id. at 830-831. Similarly,

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[1] Section 301 of the Communications Act, a general jurisdictional provision, establishes federal government control over radio channels, provides for "the use of such channels but not the ownership thereof", and requires a license for radio transmissions. Section 301 provides that "no such license shall be construed to create any right, beyond the terms, conditions and periods of the license." Section 304 of the Communications Act affirms that a licensee does not own the licensed frequencies by requiring all licensees to waive "any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same...." Section 309(h) of the Communications Act states the general terms and conditions of licenses and provides that a license does not "vest in the licensee ... any right in the use of the frequencies designated in the license beyond the term thereof." Section 310(d) of the Act provides that no license may be assigned or transferred without the Commission's prior approval. Nowhere in these sections of the Communications Act is there any suggestion that a licensee may not grant a security interest in such rights as it may have in a license.

in Minority Ownership in Broadcasting, 99 FCC 2d 1249 (1985), the Commission held that, because "... a broadcast license is not subject to ownership, it has not been subject to a reversionary interest, mortgage, lien, pledge, or any other form of security interest." Id. at 1253.

The Commission's recent decision in Bill Welch, 3 FCC Rcd 6502 (1988), marks a significant departure from the Commission's previous interpretations of the Communications Act and significantly erodes the bases for the prior Commission view that the prohibitions against the creation of security interests in a broadcaster's interest in its station's licenses are statutorily mandated.

In Bill Welch, the Commission recognized that the holder of a Commission-issued authorization possesses some property interest, albeit a limited one, in the authorization. In Bill Welch, the Commission permitted the sale at a profit of a bare construction permit for an unbuilt cellular radio system. The Commission recognized that it had previously interpreted Sections 301 and 304 of the Communications Act to prohibit the sale of a bare construction permit for profit, on the ground that a license or other authorization conveys no property interest and that a sale of a bare authorization at a profit violated the provisions of the Communications Act by essentially recognizing a valuable property interest in the authorization itself. However, in Bill

Welch, the Commission reversed this position and reinterpreted Sections 301 and 304 of the Communications Act. After analyzing the legislative history of those two statutory provisions, the Commission reasoned that those sections of the Act were intended solely to address Congressional concern that licensees might attempt to assert property rights in the actual frequencies in the electromagnetic spectrum as against the Federal Government. The Commission acknowledged that an authorization issued by it confers certain private rights on the holder of the authorization and that these rights may be sold for profit to a private party, subject to Commission approval. The Commission recognized that rights as between the holder of a Commission-issued authorization and the Commission itself are to be distinguished from rights between the holder of the authorization and a private third party. It was this distinction that permitted the holder of a bare cellular construction permit to receive a profit from the assignment of the permit to a third party.

Thus, the decision in Bill Welch suggests that, if the purpose of Sections 301 and 304 is to protect the government against licensee claims of a property right in the spectrum, it may nonetheless be statutorily permissible to allow the assertion of claims by private parties against each other, with respect to a Commission license or other authorization, but always subject to the government's superior right. In light of the Commission's decision in Bill Welch, the limited grant of a security interest

in the proceeds of the sale of a broadcast station, as a going concern, would be permissible under the Communications Act, but subject in all events to the Commission's authority.

IV. The Effect of Recent Bankruptcy Cases

Certain recent court decisions arising out of bankruptcy proceedings, relying on statements made by the Commission, have held that a security interest cannot be taken in a broadcast license and that, therefore, the collateral securing broadcast loans was worth much less than the going-concern value of the station comprising such collateral. See In re Oklahoma City Broadcasting Corp., 112 B.R. 425 (Bankr. W.D. Okla. 1990); In re Jewel F. Smith, 94 B.R. 220 (Bankr. D.Ga. 1988); New Bank of New England, N.A. v. Tak Communications, Inc., 138 B.R. 568, 70 RR 2d 810 (W.D. Wis. March 23, 1992).

In Oklahoma City Broadcasting Corp., supra, the court refused to valuate the bank's perfected security interest in an operating station as being equal to the station's going-concern value (even though the debt roughly equalled the going-concern value) and, instead, held that the bank's security interest would be valued only at the liquidation value of the debtor's tangible assets, plus a small amount for relationships with advertisers. This resulted in the lender's collateral being valuated at only two-thirds of the dollar amount at which a third party had offered to purchase the station. Apparently, the court equated

the station's going-concern value with the value of the license to the station and found that, because the bank could not have a security interest in the borrower's station license, the bank's interest could not be assessed based on the licensee's going-concern value. In this regard, the Oklahoma City court found that a broadcast license issued by the Commission is not a "general intangible" under Article 9 of the Uniform Commercial Code.

In the case of In re Jewel F. Smith, supra, the court recognized that a broadcast license became property of the bankrupt's estate upon the filing of a bankruptcy petition. However, the court in Smith went on to hold that a creditor could not take a security interest in the debtor's broadcast license. The creditor in that case had filed an objection to the bankruptcy trustee's proposed assignment of the broadcast license and had claimed that it was subject to the creditor's perfected first lien security interest in the license. The creditor argued that a security interest may be taken in a license and that the creditor may foreclose on the license after receiving Commission consent. The bankruptcy court, relying on the Commission's decision in Kirk Merkley, supra, held that a security interest may not be taken in a broadcast license.[2]

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[2] The court in Smith also cited with approval Stephens Industries, Inc. v. McClung, 789 F.2d 386 (6th Cir. 1986), in which the Court of Appeals cited in dicta, and without comment, but apparently with approval, the Commission's

(continued...)

Similarly, in New Bank of New England, N.A. v. Tak Communications, Inc., supra, the U.S. District Court affirmed the decision of the U.S. Bankruptcy Court to the effect that Commission policy prohibited a secured lender from obtaining a perfected security interest in a broadcasting license, and that, therefore, the senior secured lender could not realize on the going-concern value of the station whose assets served as collateral for a loan.

As a consequence of the decisions in Oklahoma City, Jewel F. Smith, and Tak Communications, Inc., lenders are understandably reluctant about making loans to communications entities that hold Commission licenses. Because of the uncertainty and confusion generated by these and similar cases with respect to the value of the collateral in which a broadcast lender takes a security interest, banks are taking a very cautious approach in deciding whether to lend (and how much to lend) to communications companies. In the present uncertain environment, lending

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[2](...continued)
language in Kirk Merkley which prohibited the taking of any security interest in a broadcast license. However, the Court of Appeals in Stephens Industries, Inc., was not addressing the issue of whether a creditor could perfect a security interest in a broadcast license. Rather, the Court was rejecting the argument that a mortgage on the tangible physical assets of a radio station must necessarily include the FCC license.

institutions are finding that the level of risk associated with lending to communications entities is unacceptably higher than the risk associated with loans to other similarly-situated companies. Consequently, FCC licensees are being afforded access to less financing at less favorable rates than other borrowers. Given the present uncertainty as to the ability of a senior secured lender to assure that it is fully collateralized in connection with a broadcast loan, lenders will soon require licensees to demonstrate increased equity and other collateral in order to induce them to lend for broadcast ventures, assuming that such broadcst loans are made at all. Minority licensees and investors and first-time broadcast entrepreneurs in particular, may find it very difficult to refinance or acquire new financing for broadcast acquisitions at a time when there is already a "credit crunch".

Prompt Commission declaration that a lender may take and perfect a limited security interest in the debtor-licensee's interests in a broadcast license for the purpose of realizing on the full going-concern value of a broadcast station in the event of the licensee's bankruptcy will impact on the outcome of pending and prospective bankruptcies and will encourage lenders to finance restructurings and new acquisitions in the future. Absent the type of clarification proposed here by Greyhound, lenders will perceive very little benefit (and, correspondingly, much risk) in participating in workouts. Absent lender

participation in such arrangements, financially-troubled licensees would be forced to cease operations when their physical assets are foreclosed upon, thereby depriving the public of valuable broadcast service.

V. A Suggested Approach For A Reformulation Of Commission Policy Concerning Recognition Of A Limited Security Interest In A Licensee's Interest In A Broadcast License

As is evident from the foregoing discussion, the critical need for recognition by the Commission of the ability of a lender to take a security interest in the value of a broadcast station as a going concern stems from the need by lenders to be secure in the value of their collateral, particularly in the event of bankruptcy of the debtor licensee. Stated otherwise, senior secured broadcast lenders seek no more than to vindicate the reasonable expectation which they and their debtors have had, that, subject to compliance with appropriate commercial law and the obtaining of prior Commission consent, they would ultimately be able to obtain repayment of their loans from the full going-concern value of the broadcast station whose assets secured such loans. Such senior secured lenders do not wish to control the day-to-day operations of a licensee or to own and operate broadcast stations. Rather, senior secured broadcast lenders simply seek remedial action from the Commission to send a clear message to bankruptcy courts so that they may be able to defeat the ability of general unsecured creditors to reap an unfair

windfall in a claim to the proceeds of the sale of a broadcast station in the event of the bankruptcy of a broadcast licensee. By firmly and clearly articulating a recognition of the very limited type of security interest proposed herein by Greyhound, the Commission will be assuring that general unsecured creditors of a bankrupt licensee are not unjustly enriched at the expense of senior secured lenders.

One very recent decision by the U.S. Bankruptcy Court for the District of Maryland provides the proper framework for recognizing the limited security interest in the going-concern value of a broadcast station proposed herein by Greyhound. In the case of In re Ridgely Communications, Inc., ___ B.R. ___, Case No. 89-5-1705-JS (Bankr. D.Md. April 15, 1992), the court held that a creditor may perfect a security interest in a debtor's FCC-issued broadcast license, limited to the extent of the licensee's proprietary rights in the license vis-a-vis private third parties. The court emphasized that the right of the licensee that is crucial to its decision (and the only right recognized by the court in the Ridgely case) is

> "... the right of a creditor to claim proceeds received by the debtor licensee from a private buyer in exchange for the transfer of the license to that buyer. The right to receive such proceeds is a private right of the licensee that constitutes a proprietary interest in which a creditor may perfect a security interest. It is this private right asserted against the assignee/-transferee and not against the Federal government in which ... [the secured lender] may properly assert a security interest."
>
> Id. at ¶11.

The court in Ridgely emphasized the narrowness of its holding:

> "The holding is not a recognition of a general right of creditors to take blanket security interests in broadcast licenses. Nor does the security interest recognized here entitle the creditor to 'foreclose' on a broadcasting license (i.e., initiate an involuntary transfer of the license to the creditor) or to compel the initiation of a transfer or assignment of a license to a private third party. These are rights of the licensee vis-a-vis the FCC and may not be abrogated by private agreement."
>
> Id. at ¶12.

In reaching this latter conclusion, the court in Ridgely distinguished the case from the circumstances presented in Jewel F. Smith, supra. The court reasoned as follows:

> "In Smith, the creditor sought to abrogate a right of the licensee, i.e., its ability to freely initiate a transfer of a license. The right to initiate a transfer is a right granted by the terms of the license and is seriously impaired if it is subject to the dictates of a creditor. If a security interest were recognized by the court in Smith to the extent requested, the licensee would not have had the ability to freely exercise its rights under the license. This interference in the relationship between the licensee and the Federal government is precisely the evil that the FCC was attempting to avoid by the terms of its policy against recognition of security interests outlined in [Kirk] Merkley."
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> Id. at ¶8.[3]

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[3] Thus, the court's reasoning parallels the Commission's traditional view that, if a licensee elects to sell its station, "the public interest requires that a choice be made from the whole field of possible successors, and not be limited to the party from whom the facilities were obtained in the first instance." The Yankee Network, Inc., 13 FCC 1014, 1020 (1949). Thus, it appears to have been Commission policy to assure that the licensee retains the right to select the buyer and to determine the "repository of actual control". Albert J. Feyl, 15 FCC 823, 826 (1951). Accord Turner Communications Corp., 68 FCC 2d 559, 564 (1978).

The court in Ridgley emphasized that the limited nature of the security interest claimed by the senior lender and recognized by the court implicated none of these regulatory concerns, since the lender was not asserting any interest in the rights of the debtor-licensee with respect to the Commission itself. The court emphasized, in this regard, that the right to transfer a license is a right between the Commission and the licensee, but that the right to receive remuneration for the transfer is a right between the two private parties, and it was this limited right in which the court recognized the lender's perfected security interest. Id. at ¶9.[4]

Based on the foregoing, and because the senior lender had perfected a security interest in all of the assets involved in the sale (including the tangible physical assets of the debtor and the debtor's interest in the station's broadcast licenses), the court found it unnecessary to address the issue of the valuation of the individual assets. Rather, since the station was sold as a going concern in an arms-length transaction, the senior secured lender was found by the court to be entitled to the proceeds of the sale of the station as a going concern.

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[4] The court in Ridgely also held that a broadcast license is a "general intangible" under Section 9-106 of the Uniform Commercial Code, and, in so holding, the court rejected the contrary decision on the issue reached by the U.S. Bankruptcy Court in the case of In re Oklahoma City Broadcasting Co., supra. Ridgely at ¶10.

The foregoing analysis provides a reasoned approach which strikes a fair balance as between the Commission's legitimate regulatory concerns and the reasonable expectations of private parties to financing arrangements. The Commission should expeditiously articulate that neither the Communications Act nor Commission policy prohibits a lender from taking or perfecting a security interest in a debtor-licensee's broadcasting license, limited to the extent of the licensee's proprietary rights in the license vis-a-vis private third parties, as expressly recognized by the court in Ridgely. The Commission should thus articulate and clarify that it adopts the reasoning of the court in Ridgely, thereby recognizing the right of a senior secured lender to claim the proceeds received by the debtor licensee from a private buyer in exchange for the sale of the station as a going concern. The limited and measured approach of the court in Ridgely will not threaten or undermine licensee independence or otherwise adversely affect any valid regulatory concern. However, by clearly announcing for bankruptcy and other courts that it is willing to recognize such a limited security interest, the Commission will be bringing a needed measure of stability and certainty to the broadcast lending environment, thereby facilitating the greater availability of capital for broadcast acquisitions and other transactions.

VI. Conclusion

WHEREFORE, the foregoing premises considered, Greyhound respectfully submits that the public interest, convenience and necessity would best be served by expeditious adoption by the Commission of a declaratory ruling, policy statement or rule articulating the permissibility of a licensee granting to a secured creditor of the limited security interest described above.

Respectfully submitted,

GREYHOUND FINANCIAL CORPORATION

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June 12, 1992